**CHIEW SZE SUN & ANOR.**

**v.**

**CAST IRON PRODUCTS SDN. BHD. & 4 ORS.**

HIGH COURT, KUALA LUMPUR
DATO' DR. ZAKARIA BIN MOHD YATIM J.
[CODE NO. D4-42-342-88]
8 SEPTEMBER 1993

***COMPANY LAW: Petition under s. 181, Companies Act 1965 - Allegations of mismanagement, oppressive conduct & disregard of the interests of the petitioners - Whether established - Orders to be made - Company a going concern - Whether should be wound up - Section 181(2), Companies Act 1965.***

The petitioners applied under s. 181 of Companies Act 1965 ('the Act'), for an order in terms, including, alternatively, that the company be wound up, on the grounds of mismanagement of the affairs of the company (the first respondent), oppressive conduct and disregard of the interest of the petitioners. The specific grounds of the petition were:

a. Delay in submitting audited 1981 accounts to the shareholders, submitting them only in 1987.
b. Failure of the respondents to submit the accounts for the years 1981 to 1986 to the Department of Inland Revenue, as a result of which the first respondent had to pay large instalments of tax and with substantial penalty.
c. Misappropriation of the sum of RM375,000 by the fifth respondent and the conduct of the others in protecting him and their lack of interest in recovering from him a company motor vehicle in his possession or the proceeds of its sale.
d. Loss of assets in respect of the shares held in MMF, an associated company.
e. Failure to declare dividends from 1969 to 1989.
f. Increase in the share capital of the company and its manipulation.

**Held:**

**[1]** Except on the question of the increased share capital, the affairs of the company were being mismanaged and were being conducted and the powers of the other respondents being exercised in a manner oppressive to the petitioners and in disregard of their interests as shareholders.

To show 'oppression' and 'disregard' as contained in s. 181(1)(a) of the Act, there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect. What is being attacked by the sub-section is not particular acts but the manner in which the affairs of the company are being conducted on the powers of the directors exercised. The acts may be 'oppressive' or 'in disregard' even though a particular objectionable act may have been remedied.

**[2]** It was too drastic, however, to make a winding up order in the present case, especially as the first respondent was a going concern.

In exercising its discretion under sub-section 2 of s. 181, the Court has to take into account the circumstances of the case, such as the possibility of the complaints proved being remedied in ways other than by winding the company up.

**[3]** The second, third, fourth and fifth respondents must purchase the shares of the petitioners in equal proportions. To determine the value of the shares, Messrs. Coopers & Lybrand were to be appointed to examine all the accounts and records of the company since its incorporation and to prepare proper accounts and a report for the shareholders, all expenses to be borne by the first respondent.

In the preparation of the accounts and report, the following were to be included as part of the assets of the company, and the petitioners' shares to be valued in the light of the increased share capital - the sum of RM375,000 not recovered from the fifth respondent, the proceeds of the sale of the motor vehicle, the amount representing the penalty paid to the Inland Revenue and all sums found to be owing by the second, third, fourth and fifth respondents to the first respondent.

*[Respondents to pay the costs of the petition. Parties to be at liberty to apply in the determination of the order].*

**Cases referred to:**
*Re Kong Thai Sawmill (Miri) Sdn. Bhd. [1978] 2 MLJ 227* ***(refd)***
*Re Jermny Street Turkish Baths Ltd. [1971] 3 All ER 184* ***(refd)***

**Legislation referred to:**
Companies Act 1965, ss. 165, 181(1)(a), (b), (2), 308(5)
Income Tax Act 1967, s. 90(2)

*For the petitioner - K. Anantham; M/s. Skrine & Co.*
*For the respondent - M/s. Ng Yook Woon, Andrew T.C. Saw & Co.*

**JUDGMENT**

**Dr. Zakaria bin Mohd Yatim J:**

In this petition the petitioners are applying, under s. 181 of the Companies Act 1965, for an order in terms of the following prayers:

(a) that the second, third and fourth respondents be removed forthwith as directors of the first respondent;
(b) that an approved company auditor (other than the present auditor of the company) be appointed to examine the accounts and records of the first respondent from the date of incorporation and to prepare proper accounts and a report for the shareholders;
(c) that the second, third, fourth and fifth respondents do pay to the first respondent all sums found to be due and owing by them with interest as appropriate;
(d) that the second, third, fourth and fifth respondents do purchase the shares of the first or second petitioner;
(e) such further or other orders as may be just;
(f) that the petitioners may have liberty to apply; or
(g) alternatively, that the first respondent be wound up.

The grounds upon which the application is made are mismanagement of the affairs of the company that is the first respondent, oppressive conduct and disregard of the interest of the petitioners.

Mr. Anantham, Counsel for the petitioners submitted that the petitioners' complaint of mismanagement, oppressive conduct and disregard of the interest of the petitioners was as follows:

(a) no proper accounting;
(b) misappropriation by directors of company funds;
(c) unauthorised disposal of assets of the company by directors;
(d) tax mismanagement;
(e) loss of assets; and
(f) absence of dividend.

On the question of no proper accounting, Mr. Anantham submitted that the 1981 accounts of the company were only submitted to the general members of the company for consideration in 1986 and even this were unaudited accounts. The audited accounts of the first respondent for the year 1981 were only submitted to the first respondent in 1987 for its approval. According to Mr. Anantham, the 1981 accounts were tabled only after the first petitioner despatched letters through his solicitors demanding sight of the accounts of the company.

Counsel for the respondents did not dispute the delay in submitting the audited accounts. He said the delay was due to the high volume of transactions and the conversion from the manual system of accounting to a computerised system. He referred to the affidavit of the second respondent affirmed on 15 May 1989 (Enclosure 9). In paragraph 12 of the affidavit the second respondent averred,

> I am to state that the delay in finalising the 1st respondent's account from 1981 to 1985 was due to a high volume of accounting transactions caused by the rapid growth of the 1st respondent. To accommodate the same the first computerised accounting system was used to handle the accounts. However the same could not cope with the accounts creating some problems rendering to further delay. It took some time for the problem to be rectified and finally in 1984 a bigger and faster computerised system was installed.

The delay was further explained in paragraph 11 of the affidavit of the second respondent affirmed on 19 September 1989 (Enclosure 12). Paragraph 11 of that affidavit stated,

> Your respondent denies the 1st petitioner's claim that he was instrumental in getting the directors to keep the accounts up to date when he sent his legal representative to the AGM in 1986. If he has read the directors' reports in the related years, he would have known that the delay in having the accounts ready for audit was due to the insufficient capacity of the Company's computer to handle the fast growing volumes of transactions of the Company's business in the late seventies and early eighties. When the new computer system, which was much more powerful, was installed in 1984, the accounts were immediately processed year by year as soon as the computer accounting software was running smoothly. This is evidenced from Exhibit "CSS-1" p. 10 of the said affidavit. The accounts for the years 1981 to 1985 were already with the auditors before the AGM was held on 9 December 1986.

On the allegation that the 1981 accounts were tabled only after the first petitioner had written

letters to the company, the respondents were evasive in their reply.

Mr. Anantham submitted that the respondents' explanation for the delay in tabling the company's accounts could not be accepted on the ground that there was no appeciable increase in the turnover in terms of value. He said the turnover volume was:

(a) 1981 - RM9,478,199
(b) 1982 - RM9,844,757
(c) 1983 - RM9,262,349
(d) 1984 - RM7,743,837
(e) 1986 - RM3,698,711
(f) 1987 - RM2,958,612

He said that from the figures, the turnover had decreased. He also said that it was inconceivable that the installation of a computer could result in the disruption of the financial accounts of a company for a period of five to six years.

Mr. Anantham submitted that the true reason for the delay in the preparation of the accounts of the first respondent was because, arising from the misappropriation of monies by the fifth respondent, the second, third and fourth respondents were anxious not to prepare the accounts revealing the misappropriation as this would expose the fifth respondent to criminal proceeding. He then referred to the statement made by the second respondent at a general meeting of the first respondent on 9 April 1987. At p. 4 of the minutes of the meeting it was stated:

> Mr. Wan Kok Kuang explained that when he discovered that some unauthorised money had been taken by Mr. Wan Kok On, he had approached Mr. Wan Kok On for the repayment of the said sum but he did not make any effort to do so. As the matter contravened the provision in the Companies Act 1965 and with no satisfactory reply from Mr. Wan Kok On to the auditors, the accounts were being held up.

The first respondent was only dismissed not because he misappropriated the monies but because he refused to refund the monies.

The respondents did not deny that the fifth respondent had misappropriated the funds of the Company.

The respondents did not dispute that it was their practice to sign blank cheques as alleged by the petitioners. But when they discovered that the fifth respondent had signed blank cheques to suit his means, the respondents put a stop to the practice of signing blank cheques. On the question as to why the matter was not reported to the police, Counsel for the respondents said,

> To the learned Counsel's submission that there has been no police report made by the respondents, the respondents submit that the fact that the 5th respondent had been removed as a director and there is a pending legal action against him are indicative of the respondents' desire to get back the monies misappropriated by the 5th respondent. The civil action affords a stronger guarantee that monies would be returned to the Company. A police report may result in a criminal action but the chances of restitution being made to the Company therefrom would have been minimal. In any case, the respondents could still press criminal charges against the 5th respondents in the event the civil suit against him is successful.

Mr. Anantham also alleged that there had been unauthorised disposal of the company's assets. He said that upon termination of the services of the fifth respondent as director of the first respondent, the fifth respondent was required to surrender to the company all the assets of the company including a motor vehicle bearing registration number WT 3079.

The vehicle was to be surrendered within a period of seven days. Some four months later the vehicle was still not surrendered and no steps were taken to recover the car. Indeed one year later the vehicle was still not released. By that time it was discovered that the vehicle had been transferred to a third party.

The respondents' answer to this point was that they had taken positive steps to recover the vehicle. They said that whether the recoverability was a certainty or not was surely another matter.

On the question of tax mismanagement, Mr. Anantham submitted that the failure of the respondents to prepare the accounts of the first respondent from the years 1981 to 1986 meant that these accounts could not be filed with the registry of companies and submitted to the Department of Inland Revenue in accordance with the law. He referred to paragraph 12(h) and (i) of enclosure 2 which stated as follows:

> 12(h) the directors persistently either defaulted in the preparation and submission of the company's accounts to the Inland Revenue

or forwarded inadequate accounts resulting in Inland Revenue raising additional assessment under s. 90(2) of the Income Tax Act for a sum of RM9,305,000.45 for years of assessment 1981 to 1986;

12(i) a director at the general meeting of the company held on 9 April 1987 informed the petitioners' proxy that its own provisional assessment indicated that the tax payable was much lower and that the company had already paid RM100,000 by way of taxes during the year 1987 and would continue to pay RM30,000 per month towards account of such taxes;

Mr. Anantham said that this was yet another example of mismanagement of the financial affairs of the first respondent. He added that as a result of the delay on the part of the respondents in submitting accounts to the Department of Inland Revenue, the first respondent had been required to pay large instalments of tax and with substantial penalty.

Counsel for the respondents submitted that the petitioners were relying on provisional figures. He said that the actual figures were much lower. But he admitted, however, that at all material times the auditors' reports did reveal that the company owed too much monies in the form of taxes. He said that by 1987 the tax liability of the first respondent had been reduced to RM5,642,000. According to him, having problems with the Inland Revenue Department did not warrant a presentation of a winding up petition by the first petitioner.

Mr. Anantham next dealt with the issue of loss of assets. He said that one of the unquoted investments of the first respondent was the holding of shares in an associated company known as Malayan Mechanical Foundry Sdn. Bhd. (MMF). The respondents, who were also the directors of MMF failed to file the accounts of MMF annually as required by law resulting in MMF being struck out of the register of companies. When MMF was struck out of the register it was the registered proprietor of a substantial factory land and in receipt of rental. The petitioners filed a petition under s. 308(5) of the Companies Act to restore MMF to the register of companies with the view of retrieving the factory property and the rentals. On 4 April 1988 the High Court granted the order restoring MMF to the register of companies and required the respondents to produce the accounts of MMF and to comply with s. 165 of the Companies Act with regard to the filing of the same with the Registry of Companies. Mr. Anantham said that to date the respondents had not produced the accounts of MMF.

Mr. Anantham submitted that the conduct of the respondents in connection with the affairs of MMF afforded more than ample evidence of oppression and a lack of interest on the part of the respondents in the affairs of the first respondent. He said, firstly, their failure to protect an investment of the first respondent amounted to gross negligence. Secondly, from the perusal of the accounts of the first respondent that an item which was treated as one asset of the first respondent by way of an unquoted investment in MMF in the 1977 accounts of the first respondent disappeared from the accounts of the first respondent in its subsequent years accounts with no explanation whatsoever.

The respondents' reply to the petitioners' allegation on the issue of loss of assets is found in paragraph 14 of enclosure 12 which stated as follows:

> The respondent says that the Malayan Mechanical Foundry Sdn. Bhd. (hereinafter referred to as "MMF") became a dormant company after 1970. As far as the 2nd to 4th respondents could recollect they ceased to be directors of this company soon afterwards, and had no further part in it. They have not opposed the re-registration of MMF, because they sincerely believe that it would be in the best interest of all shareholders to revive the company with the objective of winding it up officially and disposing of its assets accordingly. Notwithstanding the same the respondents expresses to the Court through Counsel that they were not admitting negligence or misconduct.

The next point raised by Mr. Anantham was the question of dividends. He contended that the petitioners had not received a single cent by way of dividend in respect of the 90,000 shares held by them in the first respondent. He said that the petitioners were entitled to dividends on the following grounds:

> Firstly, the unappropriated profits of the first respondent in 1987 stood at the substantial figure of RM3,494,6156. Accordingly a dividend of 5% to 10% would not even be one tenth of the unappropriated profit.
>
> Secondly, if the sum of RM67,500 was considered by the directors to be too large an amount for the payment of dividend, how did they account for the fact that when the fifth

respondent misappropriated RM370,000 in 1981 and no action was taken against him until January 1987.

Thirdly, if RM67,500 was considered a substantial amount by the directors, how was it that the loss of RM370,000 was not described as an unusual item but treated as a loan/advance to a director in the 1981 accounts of the company.

Finally, the profits of RM3 million had been carried forward since 1983. The respondents continued to benefit from the first respondent in terms of directors' fees and other benefits such as entertainment allowance. A shareholder like the petitioner had only the dividend to rely upon.

Mr. Anantham submitted that failure to declare dividends on the part of the respondents constituted oppressive conduct on their part and a total disregard of the interest of the petitioners. He contended that no company which had not paid dividends to its shareholders from 1969 to 1989 should be retained as a going concern.

Counsel for the respondents replied that the directors' decision not to declare dividends was a decision which was reached after due deliberation and careful study. He referred to paragraph 23 of the respondents' affidavit (enclosure 9) where the deponent averred:

> I am to state that the directors did not recommend for the 1st respondent to declare dividends because it was advisable and prudent to retain the profits as reserves for working capital which the 1st respondent greatly needed. This is even more so in view of the present economic slow down. Further the obsolete machinery and equipment of the 1st respondent need to be replaced.

The respondents said that the initial paid up capital of RM680,000 was hardly sufficient for the purchase of assets of the company such as land, factory, machinery, equipment and materials, leaving the work capital aside. It took a great number of years to generate sufficient funds to repay the loans taken for the purchase of the machinery, plants and equipment.

The respondents said that the petitioners' allegation regarding the misappropriation of funds had no relevance to the payment of dividends.

The other point raised by Mr. Anantham was the issue of the manipulation of the capital of the company.

He said that under s. 181(1)(b) the petitioners made a complaint against the acts of the respondents in increasing the paid-up capital of the first respondent by allotting shares to themselves. The initial paid-up capital of the company was only RM680,000 with the first petitioner being the registered owner of 90,000 shares of RM1 each. The first petitioner therefore controlled one sixth of the shares of the first respondent and was also a director of the first respondent. The petitioners' complaint was that he was not given an opportunity to subscribe to the new shares of the first respondent. Mr. Anantham contended that the decision to allot 670,000 shares amongst the respondents and members of their family was reflective of oppression and the respondents had disregarded the interest of the petitioners.

The respondents' reply is contained in their affidavit (Enclosure 12) in the following paragraphs:

> 2. I crave leave to refer to the affidavit-in-reply of Chiew Sze Sun affirmed on 3 July 1989 (hereinafter referred to as "the said affidavit") and in reply say that there are no preconditions as purported by the 1st petitioner before the 1st respondent may issue shares. In elaboration to paragraph 5 of my affidavit-in-reply affirmed on 25 May 1986 (hereinafter referred to as "the 1st affidavit") I say that the additional shares therein were issued legally in accordance with the 1st respondent's articles namely Article 4 which expressly provides thus:
>
> > ... shares in the company may be issued by the directors to such persons on such terms and conditions and at such times as the directors think fit...
>
> Further the Companies Act in force at that time did not require the 1st respondent to produce documentary evidence to justify the increase in its paid up capital. Thus your respondent says the 1st petitioner is misconceived in alleging that it was a requirement under the articles to offer new shares to all existing shareholders.
>
> 3. Your respondent annexed hereto the following certified true copies of director's resolutions passed in connection with all increases of the share capital:
>
> (a) Resolution dated 5 August 1972 showing the allotment marked as Exhibit "WKK-10";
>
> (b) Resolution dated 16 July 1974 showing the allotment of 200,000 shares marked as Exhibit "WKK-11";

(c) Resolution dated 17 June 1983 showing the splitting and transfers of 200,000 shares marked as Exhibit "WKK-12"

4. In respect of paragraph 3(a) above your respondent says in 1972 increase of the share capital was the result of converting debts owed to the late Wan Lee and to Syarikat Lee Heng Sdn. Bhd. This exercise was necessary in order to reduce the Company's large liabilities and to satisfy banking requirement at that time. At the same time it helped ease its working capital requirements.
5. As for paragraph 3(b) above your respondent says in 1974, 200,000 shares were purchased in cash by a Japanese couple. The increase was necessary for the company's working capital as it was having a financial liquidity problem due to the recession in that year. It also helped to finance partly for the purchase of an electric melting furnace urgently required and necessary for the economic survival of the company by reducing the production cost through the use of much cheaper raw materials and expanding its production capacity. The directors were also contemplating the idea of manufacturing products for the Japanese market, though this turned out to be not feasible later on.
6. In respect of paragraph 3(c) your respondent denies that the 5th respondent's shareholding was increased notwithstanding his guilt in the misappropriation of company funds. This is because in 1978 and 1979 the Wan family members including the 5th respondent collectively bought over the 200,000 shares from the Japanese couple. The transfers of these shares were not officially executed until 17 June 1983 as there was no immediate urgency to effect an earlier transfer. The shares were finally transferred on 17 June 1983. Hence when the 5th respondent who had also contributed to the payment of these shares in 1978 and 1979, had his shareholding accordingly increased. This has nothing to do with the respondent's knowledge of his misconduct in 1981, as the transfers were merely belated. The delay was incidental and not intentional.

In considering this petition, the Court has to determine from the affidavit evidence whether there are grounds to show that the affairs of the company were being conducted, or the powers of the directors were being exercised in a manner oppressive to one or more of the members or in disregard of his or their interests as members or shareholders as provided by s. 181(1) of the Companies Act.

The words "oppression" and "disregard" as contained in s. 181(1)(a) of the Act are explained in the judgment of the Privy Council in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1978] 2 MLJ 227. At p. 229, the Privy Council said,

> ... there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made... their Lordships would place the emphasis on 'visible'. And similarly 'disregard' involves something more than a failure to take account of the minority's interest; there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure... Neither 'oppression' nor 'disregard' need be shown by a use of the majority's voting power to vote down the minority; either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line... what is being attached by sub-section (1)(a) is not particular acts but the manner in which the affairs of the company are being conducted on the powers of the directors exercised. And these may be held to be 'oppressive' or 'in disregard' even though a particular objectionable act may have been remedied...

With regard to the accounts of the company, it was conceded by the respondents that the audited 1981 accounts were made available to the shareholders only in 1987. The respondents attempted to explain the delay but whatever the reasons for the delay this was a clear case of mismanagement. The respondents had acted in total disregard of the interest of the petitioners.

The failure of the respondents to submit the accounts for the years 1981 to 1986 is also a clear evidence of mismanagement of the financial affairs of the first respondent. As a result the first respondent had to pay large instalments of tax and with substantial penalty. Here again the affairs of the first respondent were being conducted in disregard of the interests of the shareholders. As Mr. Anantham rightly said in his written submission,

> The shareholders have naturally suffered as a result of this mismanagement of the financial affairs of the first respondent by the respondents.

With regard to the allegation that the sum of RM375,000 was misappropriated by the fifth defendant, I am satisfied that it is not a baseless allegation. The respondents were aware of the

misappropriation of funds by the fifth defendant. In paragraph 17 of his affidavit (enclosure 9) the second respondent averred that the fifth respondent was removed as director of the first respondent after the other directors had investigated in respect of the said sum by checking the accounts. He said that the fifth respondent was confronted with the matter and the fifth respondent made a verbal promise to pay the said sum within a short period of time. The fifth defendant did not fulfil his promise and he was accordingly dismissed. No claim was made against the fifth defendant to recover the money until six years after the misappropriation of the funds. From the conduct of the respondents, I find that they were acting to protect the fifth respondent rather than in the interest of the first respondent and its shareholders.

On the termination of the services of the fifth respondent as a director of the first respondent he was required to surrender to the first respondent all the assets of the company including a motor vehicle bearing registration No. WT 3079. The car was never surrendered but the respondents found later that it was sold to a third party. No police report was lodged and no legal action was taken by the respondents. From the evidence it is clear that there was an unauthorised disposal of the company's car by the fifth respondent and a lack of willingness or interest on the part of the respondents to recover the proceeds of the sale of the car from the fifth defendant. In my view this was an oppressive conduct on the part of the respondent directors.

With regard to the question of the loss of assets in respect of the MMF affairs, I agree with Mr. Anantham that the conduct of the respondents in connection with the MMF affairs afforded more than ample evidence of oppression and a lack of interest on the part of the respondents in the affairs of the first respondent.

On the question of the failure of the respondents to pay dividends to the petitioners from 1970 till the date of the petition, I am unable to accept the explanation of the respondents as to why dividends had not been paid. The unappropriated profit of the first respondent as at 31 December 1987 was RM3,494,616, and the petitioners owned 90,000 shares in the first respondent. I agree with Mr. Anantham's submission that failure to declare dividends on the part of the respondents constituted an oppressive conduct on their part and a total disregard of the interest of the petitioners as shareholders.

With regard to the increase in the share capital of the first respondent, I have read the respondents explanation as contained in their affidavit in enclosure 12. From what has been stated in the affidavit, I find nothing irregular or oppressive in the conduct of the respondents. According to the respondents, they needed to increase the share capital and they increased the share capital by resolutions of the board of directors. See *Re Jermny Street Turkish Baths Ltd*. [1971] 3 All ER 184.

After considering the affidavit evidence and the written submissions of both Counsel for the petitioners and the respondents, I find that, except on the question of the increased share capital, the affairs of the first respondent were being conducted and the powers of the other respondents were being exercised in a manner oppressive to the petitioners who were at all material times shareholders of the first respondent. I also find that the affairs of the first respondent were being conducted in disregard of the interest of the shareholders.

In the circumstances it is necessary to make an order under sub-section 2 of s. 181. Under the sub-section the Court is given the power to make an order as it thinks fit including the power to wind up the first respondent. But I think it is too drastic to make a winding up order in the present case especially when the first respondent is a going concern. In *Re Kong Thai Sawmill (Miri) Sdn. Bhd., supra*, the Privy Council said at p. 233,

> In exercising this discretion, the Court will have in mind the drastic character of this remedy, if sought to be applied to a company which is a going concern; it will take into account (a statement which is not exhaustive) the gravity of the case made out under s. 181(1); the possibility of remedying the complaints proved in other ways than by winding the company up; the interest of the applicant in the company; the interests of other members of the company not involved in the proceedings.

The principal problem in the present case is the problem relating to the financial affairs of the first respondent. This problem has to be resolved first.

I accordingly order that Messrs. Coopers & Lybrand be appointed to examine the accounts

and records of the first respondent from the date of its incorporation and to prepare proper accounts and a report for the shareholders. All expenses incurred in the examination of the accounts and records and in the preparation of the accounts and report are to be borne by the first respondent. In preparing the accounts and report, Messrs. Coopers & Lybrand shall take into consideration as part of the assets of the company:

(i) the sum of RM375,000 which was not received from the fifth defendant,
(ii) the proceeds of sale of the motor vehicle WT 3079,
(iii) the amount representing the penalty paid to the Department of Inland Revenue as a result of the late submission of accounts.

The auditor are also required to include in the report all sums found to be due and owing by the second, third, fourth and fifth respondents to the first respondent.

Once the assets of the company have been aggregated, Messrs. Coopers & Lybrand shall value the petitioners' 90,000 shares in the light of the increased share capital *viz* 1,350 ordinary shares.

Once the value of the shares is determined, the second, third, fourth and fifth respondents will purchase the shares of the petitioners in equal proportions.

The respondents will pay the costs of this petition of the petitioners.

Parties to be at liberty to apply in the implementation of this order.

**DAMANSARA JAYA SDN. BHD.**

**v.**

**PENGHUNI-PENGHUNI KUIL MUNESWARAN ALAYAM ATAU KUIL MUNIANDY MAHA KALI ALAYAM**

HIGH COURT, SHAH ALAM
DATO' MAHADEV SHANKAR J.
[ORIGINATING SUMMONS NO. 24-27-92]
30 SEPTEMBER 1992

***PRACTICE & PROCEDURE: Temple occupying portion of land - Built with consent of previous owners - Present owners acquiesced its existence - Whether temple illegal society - Whether worshippers trespassers - Inequitable act of applicant - Order 89 r. 3(b) Rules of the High Court 1980.***

In 1990 about 340 hectares of land was transferred to the plaintiff. On a small portion of the said land was a small Hindu Temple (the said temple) built in 1915 with the consent of the owners then. The plaintiffs acquiesced the existence of the said temple when it become the registered owner. The plaintiffs claimed that the temple and its worshippers had trespassed its land and that since the said temple was not registered with the Registrar of Society the said temple is illegal society.

Since January 1992 and before hearing of the summons the plaintiff had carried out massive earthworks on the said land, thereby endangering the temple structure and cutting off access to the temple completely.

**Held:**

**[1]** The plaintiffs non-compliance with O. 89 r. 3(6) was constituted by their wilful failure to disclose that the said temple was occupied with the licence and consent of their predecessors in title. At the very least they ought to have known that if such consent was not express it could readily be implied. Their misfeasance did not however end there. After filing their application they have produced a situation in which the rights, if any, of the temple devotees have been rendered nugatory. Such misconduct by itself disentitles them to any relief in this Court. He who comes for equity must be prepared to do equity and he must come with clean hands.

**[2]** Under customary Hindu Law it is well established that if a landowner sets apart land which he owns for the establishment of a temple which the public use for worship over a long